

ISSUES

Special Administrative Law Judge William F. Morrissey awarded claimant a forty-five percent (45%) work disability as a result of work-related injuries he received in an accident which occurred on January 3, 1992 while employed by the respondent. From this Award, the respondent appeals requesting that the Appeals Board review the issue of the nature and extent of claimant's disability. The average weekly wage of the claimant was an issue before the Special Administrative Law Judge, but was not raised by any of the parties on appeal. Accordingly, for purposes of calculating compensation benefits in this matter, the Appeals Board adopts the \$541.52 average weekly wage found by the Special Administrative Law Judge.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After a review of the whole record and hearing the arguments of the parties, the Appeals Board finds as follows:

The Special Administrative Law Judge found that the claimant was entitled to a forty-five percent (45%) work disability as a result of his work-related injury which occurred on January 3, 1992. Respondent argues that the claimant has failed to meet his burden of proving work disability. The respondent contends that the evidence has only established that the claimant has a permanent work-related scheduled injury to his left ankle and is not entitled to a whole body functional or work disability. Claimant, on the other hand, claims a significant work disability of approximately fifty-eight percent (58%), based on vocational expert Jerry Hardin's opinion. The Appeals Board disagrees with both the respondent's and claimant's positions in this case and finds that the claimant is entitled to a twenty-three percent (23%) permanent partial general disability based on functional impairment.

Claimant had been working for the respondent as an automobile body repairman for approximately one and one-half (1½) years prior to January 3, 1992, when he injured his left ankle. Claimant was stepping up on a frame machine when he put all of his weight on his left foot and felt his ankle pop. He immediately felt pain in his ankle. Claimant first sought medical treatment with his family physician, Dr. Holmes. Dr. Holmes eventually referred him to Dr. Eyster, an orthopedic surgeon, who placed the claimant in a cast for approximately one month and then referred the claimant to physical therapy. Dr. Jansson next treated claimant and diagnosed the claimant with reflex sympathetic dystrophy of the left ankle. Dr. Jansson also placed claimant in physical therapy. During this period of time, Dr. Hay also treated the claimant, performing seven (7) different guanethidine bire blocks. Claimant was released to return to work for the respondent in May of 1992 and worked at a comparable wage until he was laid off in December of 1992. He was subsequently followed by Dr. Jansson who had no further medical treatment to offer, except for suggestion of an amputation or a medical implant if the pain increased.

Prior to going to work for the respondent, the claimant in June of 1988 had an L4-L5 diskectomy back surgery performed by Dr. Stein. Surgery decreased his symptomatology in his low back until his accident of January 3, 1992. After this accident, his symptomatology in his low back increased and in addition, he developed symptomatology in his right ankle.

The claimant was laid off by the respondent in December of 1992. However, he was able to secure a job shortly after the layoff with Cessna on January 13, 1993. Claimant testified that he was able to perform the job at Cessna even with his prior injuries, as the job only required him to sit and sand airplane parts. One of the disputed issues in this case is the correct amount that the claimant was earning per week at Cessna. The parties entered into a stipulation, dated February 14, 1994, that contained claimant's wage information from Cessna for a period from January 13, 1993 through August 29, 1993. Also contained in the stipulation is information supplied by Cessna indicating that the employer's cost of non-statutory fringe benefits was forty-three percent (43%) of annual

salary. Claimant argued that his current average weekly wage at Cessna with the fringe benefits amounted to \$553.54 per week. Respondent contends that the claimant's average weekly wage Cessna computes to only \$427.09 per week. The Appeals Board has examined the stipulation and finds that the current average weekly wage of the claimant at Cessna amounted to \$627.76. This weekly wage is calculated by adding the claimant's straight time pay of \$336.80 per week (40 hours times \$8.42 per hour) to his average weekly overtime and bonus pay of \$102.19 (\$3,342.61 divided by 32.71 weeks) for a sum of \$438.99 and adding the fringe benefit cost of \$188.77 (43% of \$438.99) for an average weekly wage of \$627.76. Consequently, the claimant was earning a higher average weekly wage at Cessna, \$627.76 per week, than he did while employed by the respondent at \$541.52 per week.

The Appeals Board finds after the claimant was injured on January 3, 1992, that he returned in May of 1992 to work for the respondent and earned a comparable wage until his layoff in December of 1992. Thereafter, he secured a job at Cessna on January 13, 1992, again earning a comparable wage. The Appeals Board concludes that pursuant to K.S.A. 1991 Supp. 44-510e(a), the presumption of no work disability applies in this case. The claimant has testified that while he did have pain, he was able to perform the required body work for the respondent from May of 1992 to December of 1992. Both the job that he returned to for the respondent and the job he obtained at Cessna are permanent jobs and not makeshift temporary jobs. The presumption of no work disability is rebuttable, but in this case the Appeals Board finds that the credible evidence does not rebut the presumption. See Locks v. Boeing Co., 19 Kan. App. 2d 17, 864 P.2d 738 (1993). Since the presumption applies, the claimant's disability, if any, is limited to the percentage of functional impairment. See Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

With respect to functional impairment, Lawrence R. Blaty, M.D., was the only physician to testify in this case. Dr. Blaty performed an independent medical evaluation of the claimant on January 11, 1993. He found even though the claimant had received much medical treatment, his pain persists in his left foot, similar problems persist in his right foot to a lesser degree and pain continued in his low back. Dr. Blaty's assessment of the claimant's injuries were chronic left ankle reflex sympathetic dystrophy; milder early right ankle reflex sympathetic dystrophy; and exacerbated low back strain, secondary to altered gait and lower extremity function. Dr. Blaty opined within a reasonable degree of medical probability that claimant's current back problems and right ankle problems were a direct and natural consequence of his injured left ankle. The claimant's altered gait and other altered body mechanics caused by his injured left ankle resulted in his back and right ankle problems. In a workers compensation case, if a new injury is a direct and natural result of the primary injury, the new injury is compensable. See Chinn v. Gay & Taylor, Inc., 219 Kan. 196, 547 P.2d 751 (1976). In accordance with the AMA Guides, Third Edition, Revised, Dr. Blaty opined that the claimant had a twenty-three percent (23%) whole body functional impairment as a result of his work-related accidental injury to his left ankle, right ankle and low back. In arriving at the twenty-three percent (23%) rating, Dr. Blaty included the pre-existing ten percent (10%) impairment to the claimant's low back as a result of his 1988 back surgery. It has been held that if a worker's pre-existing condition is aggravated by a subsequent work-related injury, resulting in disability, the worker is entitled to be compensated for the total resulting disability. See Cox v. Ulysses Cooperative Oil & Supply Co., 218 Kan. 428, 544 P.2d 363 (1975).

It is the finding and conclusion of the Appeals Board, that the claimant has returned to comparable wage employment, the presumption of no work disability has not been rebutted and therefore the claimant is entitled to an award based on functional impairment of the whole body in the amount of twenty-three percent (23%).

The Appeals Board further incorporates herein the findings of Special Administrative Law Judge William F. Morrissey as set forth in his Award dated February 21, 1994, to the extent that they are not inconsistent with the findings and conclusions expressed in this Order.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey dated February 21, 1994, is modified as follows:

AN AWARD OF COMPENSATION IS HEREIN ENTERED IN FAVOR of the claimant, James F. Barkley, and against respondent, Kammerer Auto Body & Paint, and its insurance carrier, Ohio Casualty Insurance Company, for an accidental injury sustained on January 3, 1992, and based on an average weekly wage of \$541.52.

Claimant is entitled to 19.96 weeks of temporary total disability compensation at the rate of \$289 per week, or \$5,768.44, followed by 395.04 weeks at \$83.04 per week for a total of \$32,804.12 for a twenty-three percent (23%) permanent partial general disability, making a total award of \$38,572.56.

As of March 7, 1995, there is due and owing the claimant 19.96 weeks of temporary total compensation at the rate of \$289.00 per week or \$5,768.44, plus 145.47 weeks of permanent partial general disability benefits at \$83.04 per week in the sum of \$12,079.83 for a total due and owing of \$17,848.27 which is ordered paid in one lump sum less any amounts previously paid. Thereafter, the remaining balance in the amount of \$20,724.29 shall be paid at \$83.04 per week for 249.57 weeks or until further order of the Director of Workers Compensation.

Per stipulation, the Kansas Workers Compensation Fund is ordered to reimburse the respondent and its insurance carrier seventy percent (70%) of all the compensation benefits, medical expenses and costs incurred in this claim.

IT IS SO ORDERED.

Dated this ____ day of March, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dale V. Slape, Wichita, KS
Cortland Q. Clotfelter, Wichita, KS
Eric R. Yost, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director